

**LEMON GROVE CITY COUNCIL  
AGENDA ITEM SUMMARY**

Item No. 4  
Mtg. Date August 4, 2015  
Dept. City Attorney

**Item Title:** Ordinance No. 430 – Amending Chapter 8.24, Section 12.20.355, and Section 17.08.030 of the Lemon Grove Municipal Code to Incorporate Electronic Smoking Regulations

**Staff Contact:** James P. Lough, City Attorney

**Recommendation:**

1. Introduce and conduct the first reading by title only of Ordinance No.430 (**Attachment A**) adopting the City of Lemon Grove Electronic Smoking Regulatory Ordinance.
2. Authorize the City Attorney to prepare a summary for publication and set the matter for second reading and adoption on September 1, 2015.

**Item Summary:**

The City has been requested to consider an Ordinance that regulates electronic cigarette smoking in the same manner as tobacco regulation. The Sheriff's Department local office has asked that the City Council consider adopting regulation of electronic smoking currently on the books in the County of San Diego.

Citing health studies and the potential risks to local citizens from electronic smoking apparatus, the County has banned smoking of chemical substances by electronic means, also referred to as vaping, in the workplace. The attached ordinance also makes it clear that the smoking ban in public parks also prohibits the smoking of electronic devices.

**Fiscal Impact:**

None except possible incremental increases in enforcement costs.

**Environmental Review:**

- |   |   |
|---|---|
| <input checked="" type="checkbox"/> Not subject to review     | <input type="checkbox"/> Negative Declaration           |
| <input type="checkbox"/> Categorical Exemption, Section 15308 | <input type="checkbox"/> Mitigated Negative Declaration |

**Public Information:**

- |  |   |   |
|--|---|---|
| <input checked="" type="checkbox"/> None                     | <input type="checkbox"/> Newsletter article   | <input type="checkbox"/> Notice to property owners within 300 ft. |
| <input type="checkbox"/> Notice published in local newspaper | <input type="checkbox"/> Neighborhood meeting |   |

**Attachments:**

- A. Staff Report
- B. City of Lemon Grove Electronic Smoking Regulatory Ordinance
- C. Strike out/underline text of amended Ordinance language



# Attachment A

## LEMON GROVE CITY COUNCIL STAFF REPORT

Item No. 4

Mtg. Date August 4, 2015

**Item Title: Ordinance No. 430 – Amending Chapter 8.24, Section 12.20.355, and Section 17.08.030 of the Lemon Grove Municipal Code to Incorporate Electronic Smoking Regulations**

**Staff Contact:** James P. Lough, City Attorney

### **Discussion:**

Electronic smoking devices (“electronic cigarettes” or “e-cigarettes”) are battery powered devices which allow the user to inhale water vapor without producing fire, ash or carbon monoxide. They are designed to be “smoked” like tobacco products. The user exhales a cloud of vapor (“vaping”) that disperses chemicals, sometimes including nicotine, into the surrounding environment in a similar manner to tobacco smoke.

Currently, there is very little federal or state regulation or control of electronic smoking devices. Most laws currently relate to the use of tobacco or the smoke generated from traditional tobacco related products. Electronic smoking devices have not been widely studied but they contain a variety of chemicals and the dispersion of those chemicals in public places and workplaces have largely unknown health impacts.

In a limited analysis, the Food and Drug Administration found that electronic smoking devices do contain carcinogens, including nitrosamines as well as toxic chemicals such as diethylene glycol (<http://www.fda/newsevents/publichealthfocus/ucm173146.htm>). Although electronic smoking devices do not produce the same smoke as tobacco, they produce a cloud of vapors (defined as “smoke” for the purposes of this ordinance) containing unknown substances and sometimes produce an unpleasant odor. The possible health effects of bystanders breathing and absorbing these vapors through their skin or lungs is unknown.

### Background

In 1994, the City Council banned smoking in workplaces and in public facilities. The Council followed up with a later ban on smoking in public parks. With the adoption of Labor Code 6404.5, the State of California banned smoking in the workplace and preempted our local ordinance. This preempted ordinance was never repealed but enforcement shifted to the state laws for support.

The Legislature has yet to adopt similar legislation for electronic smoking (“vaping”) devices. However, the City retains authority to regulate its constitutional “police power” to implement its own regulations. The State smoking regulations contain a provision to allow preexisting local smoking regulations to become enforceable if the State repeals its tobacco regulations.

The attached ordinance is in three parts. A strike out/redline version of the effect laws is found in Attachment C to this Agenda item. First, Part One adopts a replacement chapter in the Lemon Grove Municipal Code for the current tobacco regulations. It follows the County of San Diego model for electronic smoking enforcement. It prevents electronic smoking in the same work places that the State prohibits tobacco smoking. Part Two adds language to the “no smoking” in parks section to include electronic smoking (“vaping”) devices. Part Three amends the subsection of the Zoning Code that defines a “smoking lounge” to allow electronic smoking products.

# Attachment A

## Environmental Impact:

Pursuant to Public Resources Code Section 21065, this action does not constitute a “project” within the meaning of CEQA. The action has no potential to cause either a direct change in the environment, or a reasonably foreseeable indirect physical change in the environment, and therefore does not require environmental review.

## **Conclusion:**

Staff recommends that the City Council introduce Ordinance No. 430 by title and allow the publication of a Summary of the Ordinance in a newspaper of general circulation.

## ORDINANCE NO. 430

### **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LEMON GROVE, CALIFORNIA AMENDING AND RENAMING CHAPTER 8.24 (SMOKING IN PUBLIC AREAS: ELECTRONIC SMOKING DEVICES); AMENDING SECTION 12.20.355 (SMOKING IN PUBLIC PARKS); AND AMENDING PART OF SECTION 17.08.030 (DEFINITIONS: SMOKING LOUNGE) OF THE LEMON GROVE MUNICIPAL CODE**

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**WHEREAS**, the City Council of the City of Lemon Grove adopted Ordinance Number 218 (1994) to prohibit smoking in workplaces; and

**WHEREAS**, the California State Legislature has since enacted Labor Code Section 6404.5 which bans smoking in workplaces and preempts local legislation on the subject, making the current Chapter 8.24 inoperative in its application to tobacco products; and

**WHEREAS**, there is no state regulation of electronic smoking devices that regulates workplaces in Lemon Grove; and

**WHEREAS**, the City Council has recognized the studies of other health and governmental organizations that determined electronic smoking devices pose a health risk to smokers and persons who work within their immediate vicinity; and

**WHEREAS**, the City Council has determined that the regulation of electronic smoking devices is necessary to protect the citizens of Lemon Grove from health risks similar to those caused by tobacco products; and

**WHEREAS**, the City Council of the City of Lemon Grove has determined to regulate electronic smoking devices in the same manner as tobacco products under California Labor Code Section 6404.5; and

**WHEREAS**, the City Council desires to leave Ordinance Number 218 in effect even though it is currently preempted by state law in that Labor Code Section 6404.5(g) allows certain preexisting ordinances regulating tobacco in the workplace can regulate workplace smoking in the future if the state repeals its workplace smoking prohibitions;

**WHEREAS**, the City Council of the City of Lemon Grove desires to extend the protections of the current regulation of smoking tobacco in the workplace and city parks to include electronic smoking to limit adverse health impacts on the public.

**NOW THEREFORE**, the City Council of the City of Lemon Grove does ordain as follows;

1. Ordinance Number 218 is to remain in effect but is no longer operative pursuant to Labor Code Section 6404.5. Upon the effective date of this ordinance, Ordinance Number 218 shall no longer be codified in the Lemon Grove Municipal Code.

2. Lemon Grove Municipal Code Chapter 8.24 (SMOKING IN PUBLIC AREAS: ELECTRONIC SMOKING DEVICES) is renamed and added to read as shown in Attachment "C", part 1, which is attached hereto and incorporated herein by reference.

## Attachment B

3. Lemon Grove Municipal Code Section 12.20.355 (SMOKING IN PUBLIC PARKS) (Massage Therapy Practice: Local Licensing) is amended to read as shown in ATTACHMENT "C", part 2, which is attached hereto and incorporated herein by reference.

4. Lemon Grove Municipal Code Section 17.08.030 (DEFINITIONS) is amended only with respect to the definition of "SMOKING LOUNGES" to read as shown in Attachment "C", part 3, which is attached hereto and incorporated herein by reference.

**INTRODUCED** by the City Council on August 4, 2015. **PASSED AND ADOPTED** by the City Council of the City of Lemon Grove, State of California, on September 1, 2015 by the following vote:

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## Attachment C, Part 1: Chapter 8.24 Smoking in Public Areas (Electronic Smoking Devices)

### 8.24.010 FINDINGS AND INTENT.

(a) Credible studies have demonstrated that there are health concerns regarding the use of tobacco products and electronic smoking devices by users of the devices and bystanders.

(b) The U.S Food and Drug Administration (FDA) has found that tobacco products do contain carcinogens and other harmful substances. Nicotine is contained in tobacco. Nicotine is a highly addictive neurotoxin included in the Proposition 65 list of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity. Nicotine is known to cause birth defects. Nicotine is a component of the emissions from tobacco products and involuntarily exposes non-users to nicotine.

(c) The Centers for Disease Control and Prevention has reported that from 2011-2012, the use of electronic cigarettes by U.S. middle and high school students more than doubled.

(d) Despite the potential use of electronic smoking devices as an aid to quitting smoking, the products are not approved by the for smoking cessation or treatment of any health concerns. An analysis by the FDA found that e-cigarettes do contain carcinogens, including nitrosamines as well as toxic chemicals such as diethylene glycol. Although electronic smoking devices do not produce the same smoke as conventional tobacco product cigarettes, they do produce a cloud of vapors containing unknown substances and sometimes produce unpleasant odors. The possible health effects of bystanders breathing or absorbing these vapors through their skin is unknown.

(e) Nicotine is contained in most electronic smoking devices. Nicotine is a highly addictive neurotoxin included in the Proposition 65 list of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity and is known to cause birth defects. Nicotine is a component of the emissions from electronic smoking devices containing nicotine and involuntarily exposes non-users to nicotine.

(f) Scientific studies and FDA testing demonstrated that the solutions in electronic smoking devices contained toxic chemicals and that labelling often-misrepresented nicotine content contained in the devices.

(g) There are products approved by the FDA for smoking cessation. To date, scientific studies have not demonstrated the benefit of electronic smoking devices for smoking cessation. The FDA does not approve these devices for smoking cessation.

(h) With certain exceptions, state law prohibits smoking inside an enclosed space at a place of employment.

(i) The use of electronic smoking devices in locations where the smoking of tobacco is prohibited may cause confusion and uncertainty, and make it more difficult to enforce smoke free environments and other prohibitions on smoking tobacco.

(j) The enactment of this Ordinance is not intended to repeal the provisions of Ordinance Number. 218, enacted in 1994. By adoption of this Ordinance, Ordinance Number 218 shall no longer be codified in the Lemon Grove Municipal Code. Ordinance Number 218 law that shall remain in effect but no longer be operative since the State of California has preempted the field of regulation with the

# Attachment C

enactment of Labor Code Section 6404.5. Under Labor Code Section 6404.5(g), Ordinance Number 218 shall become operative if the State repeals the tobacco restriction provisions of Labor Code Section 6404.5.

(k) It is the intent of the City Council in enacting the Ordinance that amends Chapter 8.24 of the Lemon Grove Municipal Code to provide for the public health, safety and welfare, by prohibiting the use of electronic smoking devices where state law or regulation prohibits the use and smoking of tobacco products under Labor Code Section 6404.5.

(Added by Ord. No.)

## 8.24.020 Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as hereafter set out, unless it is apparent from the context that a different meaning is clearly intended:

- "Electronic smoking device" is defined as an electronic and/or battery operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substances. "Electronic smoking device" includes any such electronic smoking device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor. "Electronic smoking device" does not include any product specifically approved by the U.S. Food and Drug Administration for use in mitigation, treatment, or prevention of disease.

"Enclosed space" is defined as set forth in state law, Labor Code section 6404.5 and includes lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building.

"Place of employment" is defined as set forth in state law, Labor Code section 6404.5.

"Smoking" or "Smoke" for the purpose of this Chapter is also defined as the use of an electronic smoking device intended to emulate smoking, which permits a person to inhale vapors, mists or aerosol that may or may not contain nicotine.

## 8.24.030 PROHIBITION ON USE OF ELECTRONIC SMOKING DEVICES IN AN ENCLOSED SPACE AT A PLACE OF EMPLOYMENT AND OTHER LOCATIONS

(a) Enclosed Spaces at Places of Employment. No person shall engage in the smoking of an electronic smoking device in the City of Lemon Grove in an enclosed space at a place of employment, as defined in Labor Code section 6404.5 or his Chapter 8.24, whichever provision is operative. The prohibition in this section shall not apply to any place that is not defined as an enclosed space or a place of employment or any place that is otherwise excepted from the smoking prohibitions in Labor Code section 6404.5 or to any place of employment in a public building owned, leased or operated by another governmental jurisdiction.

(b) Other Locations Where Smoking Tobacco is Prohibited by State Statute or Regulation. No person shall engage in the smoking of an electronic smoking device in any other location where smoking tobacco is prohibited by any state statute or regulation.

## 8.24.040 VIOLATIONS AND ENFORCEMENT.



## Attachment C

Any violation of the prohibition set forth in Section 8.24.030 is an infraction, punishable by a fine not to exceed one hundred dollars (\$100) for a first violation, two hundred dollars (\$200) for a second violation within one year, and five hundred dollars (\$500) for a third and for each subsequent violation within one year.

### 8.24.050 SEPARATE VIOLATION FOR EACH INCIDENT.

Each incident in violation of Section 8.24.030 shall constitute a separate offense.

### 8.24.060 ENFORCEMENT AUTHORITY.

The City Attorney and the Sheriff are authorized to administer and enforce this chapter. The City Attorney and the Sheriff may exercise any enforcement powers provided by law to enforce this chapter

#### 8.24.070 Nonretaliation.

No person or employer shall discharge, refuse to hire, or in any manner retaliate against any employee or applicant for employment because such employee or applicant exercises any rights afforded by this article. Violation of this section is a misdemeanor punishable according to Chapter 1.12 of this code. (Ord. 218 § 1, 1994)

#### 8.24.080 Other applicable laws.

This chapter shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws. (Ord. 218 § 1, 1994)

#### 8.24.090 Severability.

If any provision or clause of this chapter or the application thereof to any person or circumstances is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions, clauses or applications thereof which can be implemented without the invalid provision, clause or application, and to this end the provisions and clauses of this ordinance are declared to be severable. (Ord. 218 § 1, 1994)

### **ATTACHMENT C, Part 2: CHAPTER 12.20 (Parks and Facilities)**

#### 12.20.355 Smoking in public parks.

It is unlawful to possess a lighted or burning tobacco product; ~~or~~ tobacco-related product or use an electronic smoking device, as defined in Lemon Grove Municipal Code Chapter 8.24, at any time within the boundaries of any park, including designated parking areas of any city park. (Ord. 383 § 1, 2009)

### **ATTACHMENT C, Part 3: CHAPTER 17.08 Definitions (ZONING TITLE)**

#### 17.08.030 Definitions.

Throughout this title, the following words and phrases shall have the meanings found in this section:

“Smoking lounge” means businesses that include cigar lounges, electronic smoking lounges ~~and hookah lounges,~~ or any combination of those uses. Smoking lounges may serve food.